1995

Paul Hatch dba P.H. Properties v. Kevin Rogan dba Sierra Properties : Brief of Appellant

Utah Court of Appeals

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Gregory J. Sanders; Sandra L. Steinvoort; Kipp & Christian; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

PAUL HATCH dba P. H. PROPERTIES, Plaintiff and Appellee, vs. KEVIN ROGAN dba SIERRA PROPERTIES Defendant and Appellant.	.A10 DOCKET NO. 950098-CA Case No. 950098-CA Priority 15

BRIEF OF APPELLANT

APPEAL FROM THE THIRD CIRCUIT COURT, SALT LAKE COUNTY
HONORABLE PHILLIP K. PALMER

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STATEMENT OF INTERESTED PARTIES

All parties to this proceeding appear in the caption.

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JURISDICTION

This is an appeal from the Third Circuit Court. The jurisdiction of the Utah Court of Appeals arises under §78-2a-3(2)(d).

STATEMENT OF ISSUES

The first issue is whether the circuit court erred in denying a Rule 60(b)(1) motion to set aside a summary judgment for excusable neglect? The standard of review of this issue is whether the trial court abused its discretion. Birch v. Birch, 771 P.2d 1114 (Utah App. 1989).

The second issue presented is whether the circuit court erred in denying a Rule 60(b)(5) motion to set aside a summary judgment granting the dismissal of a counter-claim in excess of $20,000 in that such counter claim was outside the jurisdiction of the circuit court. The standard of review is that this court may freely substitute its determination of jurisdiction for that of the trial court. State Department of Social Services v. Vigil, 784 P.2d 1130 (Utah 1989).

These issues were preserved by a timely filing of a motion found in the record at page 103.

DETERMINATIVE LAW

The following provisions are reproduced in the Addendum:

Rule 60, Utah Rules of Civil Procedure
§78-4-7, U.C.A.
§78-3-4, U.C.A.

STATEMENT OF THE CASE

A. Nature of the Case

This is an action by a lessor against a lessee for unpaid rent with the lessee counter-claiming for substantial damage to property stored on the leased premises.

B. Course of Proceedings

On May 20, 1993, plaintiff filed an action for eviction with a claim for unpaid rents. Record, p. 1. Defendant answered with a counter-claim for damage to property stored in the warehouse at issue. Record, p. 32. As the matter proceeded, there were two counsel for the plaintiffs. David Church represented plaintiff on the claim for rents and Robert Wallace represented the plaintiff in defense of the counter-claim. Record, p. 40.

On May 31, 1994, counsel for Rogan withdrew. Record, P. 54. Essential to this appeal is that Rogan claims that he was unaware of this withdrawal. Record, p. 113. A Notice to Appear was sent to the incorrect address. Compare Record, p. 77 with p. 114. On June 15, 1994, Wallace filed a motion for summary judgment on the counter-claim. Record, p. 66. A hearing was held on that motion on July 28, 1994. Rogan was not present for reasons explained in the statement of facts. See Record, p. 78 and Addendum.

On August 17, 1994, Church filed a motion for summary judgment on the rent claim. Record, p. 91. The Motion was granted without hearing on September 6, 1994. Rogan did not respond to either motion.

On October 6, 1994, Rogan filed a motion to set aside both default summary judgments for reasons explained in the statement of facts. Record, p. 103. The court denied the motion without hearing on November 10, 1994 and the formal order denying the motion was signed January 9, 1995. Record, p. 156. Rogan filed his notice of appeal on February 8, 1995. Record, p. 158.

C. Statement of Facts

Plaintiff is a lessor of a storage warehouse in Salt Lake County. Defendant and appellant is an individual that leased space and put a substantial quantity of valuable property into the warehouse. The dispute between the parties arose when a water pipe broke and caused damage estimated at several hundred thousand dollars to Rembrandt etchings and other property stored in the facility. Rogan, not receiving compensation for the water damage as he believed he was due, quit paying rents. Hatch, the lessor, then brought an action for rents plus treble the rents as allowed by law. Rogan counter-claimed for $900,000 in damage to his property. Record, pp. 1, 32.

Rogan hired one of the largest law firms in the state to defend the rent claim and to pursue his claim for damage to his property. Record, p. 32. As his affidavit explains, his counsel had told him that there would be large gaps of time in which he would not hear from them concerning the progress of the litigation. Record, p. 113. His counsel withdrew and sent the notice of withdrawal to an old address. Record, p. 114. Rogan admits that he received notice of some pleadings but assumed they were

informational copies and that his counsel was responding to them. Record, p. 114. Eventually, he learned that his counsel had withdrawn and that a hearing was set for July 20, 1994. He thought the hearing was to discuss the need for counsel and appeared at the court on July 20, 1994. Record, pp. 78, 114. Upon appearance, nobody was there and he learned that the hearing was for a motion for summary judgment which had been changed without prior notice to him to July 28, 1994. Rogan discussed with a court clerk that his son was being married out of state and he would be gone on July 28. The clerk of the court told him that the hearing date would be changed and he would be notified. To protect himself, Rogan sent, before the scheduled motion hearing, a certified letter to the clerk of the court confirming the conversation. Record, p. 78.

Despite the conversation with the clerk of the court and the confirmation letter, the hearing was held anyway and summary judgment was entered against him dismissing his counter-claim with prejudice even though it exceeded the $20,000 jurisdictional limit stated in the Utah Code. Record, p. 79.

Rogan was out of state for several weeks. When he came back he learned that the counter-claim had been dismissed and that a second summary judgment had been filed for the unpaid rents. Rogan had always understood that the case would not be resolved pending the rescheduled hearing, but the second motion was granted without a hearing. Record, p. 115. Upon learning of the summary judgment, Rogan took immediate steps to protect his interest. Record, pp. 115, 122. Rogan then filed a timely Rule 60(b) motion to set aside

these judgments for excusable neglect and because the circuit court was without jurisdiction to rule on an $900,000 counter-claim. The circuit court affirmed its earlier ruling.

SUMMARY OF ARGUMENT

This brief shows that there were a series of mistakes which led to the entry of two summary judgments against the appellant. Sufficient evidence was presented at the trial court level to show that excusable neglect was present and that the trial court abused its discretion by failing to recognize that there was a good faith mistake made and that the appellant acted diligently in trying to protect his interests.

The trial court also erred in not setting aside at least the judgment on the counter-claim as the jurisdictional amount of $20,000 was exceeded by several hundred thousand dollars. Even if the trial court had found correctly that excusable neglect was not present, there was no jurisdiction to enter both summary judgments for the plaintiff.

ARGUMENT

I.

IT WAS ERROR NOT TO SET ASIDE THE JUDGMENT ON THE COUNTER-CLAIM

A. Applicable Law

There is, perhaps, no principle more fundamental than a court may not act where it does not have jurisdiction. The powers of a court are limited to those matters which may be traced to a source of jurisdiction. Utah Department of Business Regulation v. Public Service Commission, 602 P.2d 696 (Utah 1979). Following that general principle, the Circuit Court Act of 1977 provides for the jurisdiction of the Circuit Courts of this state in Title 78, Chapter 4. Specifically, §78-4-7 provides that the circuit court has civil jurisdiction in all matters in which the sum claimed is less than $20,000. This grant of jurisdiction is reenforced by §78-3-4(3) which provides that judges of the district court may transfer to the circuit courts cases filed in the district court which also fall under the jurisdiction of the circuit court. This power to transfer cases implies that smaller cases are to be primarily considered in the circuit courts.

In Maxwell v. Maxwell, 796 P.2d 403 (Utah App. 1990), this court held that where a motion to vacate a judgment is based upon a claim of no jurisdiction the trial court has no discretion but to vacate the judgment if jurisdiction did not exist. Utah case law appears silent on whether a default leading to a judgment may stand where there was no jurisdiction, but other states have held that a

default judgment should be set aside where there was no jurisdiction for the claim made. VanNort v. Davis, 800 P.2d 1082 (Okl. App. 1990).

There is no recent Utah case law concerning whether counter-claims in a circuit court which exceed the $20,000 jurisdiction deprive the circuit court of jurisdiction. However, in Hardy v. Meadows, 264 P. 968 (Utah 1928), the Utah Supreme Court held that a counter-claim exceeding the jurisdictional limits of a city court deprive the city court of jurisdiction over the counter-claim. See also Thompson v. Jackson, 743 P.2d 1230 (Utah App. 1987) and Burns Chiropractic Clinic v. Allstate Insurance Company, 851 P.2d 1209 (Utah App. 1993), wherein this court held that circuit court jurisdiction is limited to that defined by statute.

Other states have held that when a claim seeks more than the jurisdictional amount of the court, the court does not have jurisdiction over the subject matter. See Alder v. Crest Corporation, 472 P.2d 310 (Idaho 1970); Flying Tiger Line, Inc. v. Portland Trading Company, 608 P.2d 577 (Or. App. 1980).

In summary, a fair statement of existing law is that a court may act only where it has jurisdiction and jurisdiction of the circuit courts in Utah is defined by statute to be civil matters involving claims of less than $20,000. A claim in excess of the jurisdictional amount is outside the jurisdiction of the circuit court.

B. Judgment on the Counter-Claim Should be Set Aside.

If one applies the facts of this case to the objectively stated rules above, it becomes readily apparent that the judgment dismissing with prejudice the counter-claim should have been set aside by the trial court. The counter-claim, found at Record, p.32, was for $911,400.00. This is obviously far in excess of the $20,000.00 jurisdictional limit of the circuit court.

Rogan moved under Rule 60(b)(5) that the judgment should be set aside because it was void. Record, p. 103. The circuit court should have followed Maxwell v. Maxwell, described above, and vacated the judgment upon a finding of no jurisdiction. The conclusion is surprisingly simple, and the denial of the Rule 60(b)(5) request was plain error.

In State Department of Social Services v. Vigil, 784 P.2d 1130 (Utah 1989), the court held a challenge to jurisdiction is a matter for which this court may freely substitute its judgment for that of the trial court. This standard of review allows this court to correct the error made in the circuit court by declaring the judgment entered upon the counter-claim to be void and without legal effect.

II.

FAILURE TO SET ASIDE SUMMARY JUDGMENT ON THE ORIGINAL CLAIM WAS AN ABUSE OF DISCRETION

A. Applicable Law

The recitation of facts describes a scenario in which a person who thought he was represented by counsel had, in effect, defaults

entered on motions for summary judgment against him despite good faith efforts to appear and defend against the two motions once he understood his procedural status.

The general rule is that the judgment is to be sustained unless cause to set it aside exists under Rule 60(b). Amica Mutual Insurance Company v. Schettler, 768 P.2d 950 (Utah App. 1989). The reasons for setting aside a judgment under Rule 60(b) include excusable neglect. Such a motion must be brought within three months of entry of the judgment. Existence of excusable neglect is for consideration by the trial court and will be reversed on appeal only where it is shown an abuse of discretion has occurred. Erickson v. Schenkers International Forwarders, Inc., 882 P.2d 1147 (Utah 1994).

One seeking to set aside a judgment under 60(b) must not only show that the motion is timely, but also that there is a meritorious defense. Ericksen, Id.

Motions to set aside a judgment for excusable neglect are generally denied where there is a failure of a party to be diligent. Motions to set aside judgments may be granted when a party has acted good faith and a default results from genuine mistake. May v. Thompson, 677 P.2d 1109 (Utah 1984); Russell v. Martell, 681 P.2d 1193 (Utah 1984).

B. The Trial Court Abused Its Discretion.

Rogan made a timely Rule 60(b)(1) motion. The final order on the summary judgment concerning the counter-claim was granted August 3, 1994. Record, p. 79. The judgment on the original

claim, resolving all issues in the litigation, was entered September 12, 1994. Record, p. 98. The Rule 60(b)(1) and (5) motion was filed on or about October 6, 1994. Record, p. 103. Filing the motion about three weeks after the last judgment was entered is clearly within the three month requirement of Rule 60(b).

The facts supporting setting aside the judgment are compelling. As explained in the record, at page 113, 117, and 122, Rogan had been told by his own counsel that he would not hear anything for months. The motion to withdraw as counsel was sent to an incorrect address. Rogan admits that he later received pleadings addressed to his home, but thought that they were information copies. When he realized that his counsel had withdrawn, Rogan appeared pursuant to notice given for a hearing on July 20, 1994, the purpose of which was uncertain to him. Upon appearing, he learned that the hearing had been set without notice to him for July 28, 1994. The new hearing date fell upon a date he planned to be out of state to attend his son's wedding. He discussed the matter with the clerk of the court and claims to have been told that a new date would be set and he did not need to appear. Out of caution, a certified letter was sent to the clerk of the court confirming the conversation. This letter was received by the court on July 26, 1994, two days before the hearing. Mr. Rogan saved the return receipt showing that it had been delivered. Record, pp. 117, 120. Rogan understood that no action would be taken pending another hearing to be set in the future, but the

court proceeded with the entry of two summary judgments on his default.

Rogan's appearance at a court hearing and subsequent sending of a certified letter to the court shows that he had a real interest in the conduct of the litigation once he learned that his counsel was no longer participating. He actively took steps to avoid a negative impact pending retaining new counsel. Any neglect which led to the entry of the judgments is excusable in that Rogan understood that he had taken steps to protect himself and thought he was being accommodated by the court allowing him to leave the state for an extended period to be followed by a rescheduled hearing.

The circuit court abused its discretion in that it failed to recognize that judgments entered upon default are not favored in the law and that any reasonable excuse ought to be sufficient cause to grant relief. Westinghouse Electric Supply Company v. Paul W. Larsen, Contractor, 544 P.2d 876 (Utah 1975). Mr. Rogan acted in a manner consistent with one who was attempting to protect his interest but got caught up in either an apparent misunderstanding or an oversight on the part of the court. Absent some affirmative evidence that Rogan acted in a careless or disinterested manner, the policy disfavoring default judgments should have been followed and the judgments set aside.

The final 60(b) element that there be an arguable defense is also present. Utah has not spoken recently to the obligation of a landlord in a commercial setting for damage to a tenant's property.

This silence is, perhaps, due to the fact that the obligation is obvious. In Farr v. Wasatch Chemical Company, 143 P.2d 281 (Utah 1943), a landlord was held liable for failure to maintain a warehouse to meet the known requirements of the tenant. In Keller-Loup Construction Company v. Gerstner, 476 P.2d 272 (Colo. App. 1970), the landlord was held liable for failure to maintain a water pipe resulting in damage to property of a tenant. Under these rulings, Rogan arguably may be responsible for the payment of some rent but may also have offsetting claims under his counter-claim for damage to his property. Absent a trial to discover the scope and terms of the obligations of the parties, there is an arguable defense that rent may not even be due.

Certainly, a judgment of treble the amount claimed in the context of no jurisdiction for the counter-claim, a default entry of summary judgment, and circumstances wherein the court itself was involved in leading Rogan to excusable neglect, raises a substantial question of whether such a judgment ought to stand in light of available defenses and the counter-claim. This court should find that an abuse of discretion occurred under these circumstances and set aside the judgments.

In addition to excusable neglect, there is a substantial question of whether the circuit court had jurisdiction to enter a judgment on the original claim where it lacked jurisdiction on the counter-claim. That question has not been resolved in Utah law. Some help is found in Carreathers v. Carreathers, 654 P.2d 871 (Colo. App. 1982), there, plaintiff filed a forcible entry and

detainer action and the defendant answered claiming to be the owner of the property and that the property had a value in excess of the jurisdictional limit of the court. Though this was not a true counter-claim, the court recognized that the defense raised, and which ultimately led to the plaintiff having to convey a deed to the defendant, made the total dispute in excess of the jurisdictional limit of the trial court.

Also helpful is Thompson v. Jackson, 743 P.2d 1230 (Utah App. 1987). There, two defendants asserted lien interests in certain property in the amount of $15,000 and $50,000 in answers to a complaint concerning real property. The court held that the circuit court, whose jurisdiction was $10,000 at the time, did not have jurisdiction over the entire dispute where there were claims in excess of $10,000.

Finally, §78-4-7 talks in terms of the circuit court having jurisdiction in all matters if the sum claimed is less than $20,000. The term "sum" is not defined but could reasonably be read to mean the total amount at issue in any pending lawsuit. Otherwise, the rule would have to be that claims and counter-claims arising out of the same subject matter are split between the district and circuit courts depending on amount or that the circuit court would have jurisdiction over all claims provided the claim filed by the plaintiff was within the jurisdictional limit.

Both of these alternatives are contrary to good policy. The splitting of claims only increases the amount of litigation in the courts and sets up lawsuits for differing results from different

triers of fact. Allowing the circuit court to consider counter-claims in excess of $20,000 would be to avoid the policy expressed in Title 78 that circuit courts have a jurisdictional limit to consider more minor matters than the district court. The only logical conclusion is that jurisdiction of the circuit courts should be interpreted to mean that if any party claims more than $20,000 then the case belongs in the district courts.

To avoid the problems that come with separating claims and counter-claims into different courts based on jurisdictional amounts, this court should hold that when a counter-claim is in excess of $20,000, jurisdiction is lost and the entire case should be in the district court. In terms of this case, even if there was not excusable neglect, the circuit court was without jurisdiction to enter the summary judgment.

CONCLUSION

This brief has shown that the circuit court lacked jurisdiction to consider a counter-claim in excess of $900,000. The court should have declined to rule on the counter-claim and should have set aside the judgment entered on the counter-claim as beyond its jurisdiction.

This brief has also shown that there was excusable neglect and that the trial court abused its discretion in not vacating the judgment entered on the principal claim of the plaintiff. Additionally, with the counter-claim being in excess of the $20,000 jurisdictional limit, the circuit court was deprived of

jurisdiction over the original claim. Utah law is not complete on this point but common sense dictates that other approaches would multiply litigation and have a potential for differing results on claims of the parties arising under the different jurisdiction of different courts.

This court is respectfully requested to set aside the two judgments entered by the circuit court for lack of jurisdiction and excusable neglect.

DATED THIS 14th day of April, 1995.

KIPP AND CHRISTIAN, P.C.

GREGORY J. SANDERS, ESQ.
SANDRA L. STEINVOORT, ESQ.
Attorneys for Defendant

ADDENDUM

RULE 60, UTAH RULES OF CIVIL PROCEDURE

Rule 60. Relief from judgment or order.

(a) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

§78-3-4, U.C.A.

78-3-4. Jurisdiction — Transfer of cases to circuit court — Appeals — Jurisdiction when court does not exist.

(1) The district court has original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution and not prohibited by law.

(2) The district court judges may issue all extraordinary writs and other writs necessary to carry into effect their orders, judgments, and decrees.

(3) Under the general supervision of the presiding officer of the Judicial Council and subject to policies established by the Judicial Council, cases filed in the district court, which are also within the concurrent jurisdiction of the circuit court, may be transferred to the circuit court by the presiding judge of the district court in multiple judge districts or the district court judge in single judge districts. The transfer of these cases may be made upon the court's own motion or upon the motion of either party for adjudication. When an order is made transferring a case, the court shall transmit the pleadings and papers to the circuit court to which the case is transferred. The circuit court has the same jurisdiction as if the case had been originally commenced in the circuit court and any appeals from final judgments shall be to the Court of Appeals.

(4) Appeals from the final orders, judgments, and decrees of the district court are under Sections 78-2-2 and 78-2a-3.

(5) The district court has jurisdiction to review agency adjudicative proceedings as set forth in Title 63, Chapter 46b, Administrative Procedures Act, and shall comply with the requirements of that chapter, in its review of agency adjudicative proceedings.

(6) When a circuit court is given original or appellate jurisdiction of a matter and no such court exists in the county of proper venue, the district court shall have jurisdiction. Notwithstanding Section 78-3-14.5, criminal fines and forfeitures collected in such cases shall be distributed as if filed in the circuit court. Notwithstanding Section 78-3-16.5, civil filing fees in such cases shall be the same as if filed in the circuit court. The party filing a pleading or other document shall, at the time of filing, provide proof that the pleading or other document qualifies for the circuit court fee.

§78-4-7, U.C.A.

78-4-7. Civil jurisdiction — Exceptions.

The circuit court has civil jurisdiction, both law and equity, in all matters if the sum claimed is less than $20,000, exclusive of court costs, except:

(1) in actions to determine the title to real property, but not excluding actions to foreclose mechanics' liens;

(2) in actions of divorce, child custody, and paternity;

(3) in actions under the Utah Uniform Probate Code;

(4) in actions to review the decisions of any state administrative agency, board, council, commission, or hearing officer;

(5) in actions seeking remedies in the form of extraordinary writs; and

(6) in all other actions where, by statute, jurisdiction is exclusively vested in the district court or other trial or appellate court.

JULY 20, 1994 LETTER BY ROGAN

Kevin Rogan
211 South Sandrun Road
Salt Lake City, Utah 84103
(801) 355-6717

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

July 20, 1994

Debbie Peterson, Deputy Clerk
Salt Lake Department Court
Third Circuit Court Building
451 South 200 East
Salt Lake City, Utah 84111

Re: CASE NO. 930005684 CV
HONORABLE PHILIP K. PALMER
PAUL HATCH, DBA P H PROPERTIES
-VS-
KEVIN ROGAN, DBA SIERRA PROPERTIES

Dear Ms. Peterson:

This is to confirm my conversation with your office (Candy) at approximately 8:30 am today, July 20, 1994, regarding my notice to appear. I was informed by Candy that the above referenced case had been set-over to July 28, 1994, at 9:00 am. I had not received any notice of this change of date from the 20th to the 28th, and my plans and commitments (my son's wedding out of state, planned for over six months) will not have me returning to Salt Lake City until after August 10, 1994. I respectively request a date for this case be set for sometime after that.

Please note I was there and available to appear on the 20th, as requested by the Court. Had I been sent notice of the change, I would have communicated the date conflict and request sooner.

I appreciate your consideration and look forward to receiving your response as soon as possible.

Very truly yours,

Kevin Rogan

Kevin Rogan

MAILING CERTIFICATE

I HEREBY CERTIFY that on the 14th day of April, 1995, I caused two true and correct copies of the foregoing BRIEF OF APPELLANT to be mailed, postage prepaid, to the following:

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Attorney for Plaintiff
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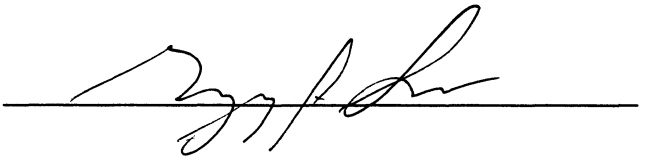

ROGAN\BRIEF